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By email to: AHS.MedicaidPolicy@vermont.gov

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Agency of Human Services
280 State Drive, Center Building
Waterbury, VT 05671-1000

Re: HCAR Filing 11 Proposed Rules (GCR 23-091);
4.105 Medicaid Coverage of Exception Requests

Dear Medicaid Policy Unit:

Thank you for the opportunity to comment on the proposed changes to the HCAR rule governing 4.105 Medicaid Coverage of Exception Requests. The Office of the Health Care Advocate, the Disability Law Project, the Elder Law Project, and the Vermont Ombudsmen Project at Vermont Legal Aid, submit the following comments in response to the proposed HCAR changes:

1. Section 4.105.1 General

Under the proposed change, requests from beneficiaries under 21 years old will be processed pursuant to requirements of HCAR 4.106, Early and Periodic Screening, Diagnostic and Treatment (EPSDT) Services. We do not object to this change, but it must be accompanied by a revision of the notices that beneficiaries and their family members or guardians receive.

Beneficiaries need clear, plain-language notices about EPSDT coverage standards for the notices to be meaningful. These notices should provide background information on EPSDT and describe what it can cover. The notices should state that EPSDT can cover services that would not be covered for adults. Finally, notices should clearly outline the appeal process. Vermont Legal Aid proposes that DVHA write a new EPSDT notice with input from both the Office of the Health Care Advocate and Disability Law Project.

2. Section 4.105.2 Criteria

The criteria at (B)(2) appears to be duplicative of (A)(1) as they both require a category under 1396d(a).

(A)(1) "Fit within a category or subcategory of services described at 42 U.S.C. 1396d(a)."

(B)(2) "The service fits within a category or subcategory of services described at 42 U.S.C. 1396d(a) that is offered by Vermont Medicaid for adults"

We object to changing the standard for the criteria at (B)(4) to "no rational basis" from the existing regulation which allows for consideration of whether or not there is a rational basis. Requiring "no rational basis" conflicts with the stated purpose of including this criterion, which is set out clearly in the next sentence, not to deny the request "arbitrarily".

(B)(4) "There is ~~no~~ a rational basis for ~~excluding~~ approving coverage of the service. The purpose of this criterion is to ensure that DVHA does not arbitrarily deny coverage for a service. Vermont Medicaid may not deny coverage for a service solely based on diagnosis, illness, or condition, or solely based on its cost."

The criteria at (B)(7) should include "or are contraindicated for the individual". If the alternative treatment is contraindicated for the individual, the individual should not be required to undergo a failed trial of that treatment.

(B)(7) "Less expensive, medically appropriate alternatives are not available, or have been trialed and failed, or are contraindicated for the individual."

3. Section 4.105.4 Approvals

Vermont Legal Aid objects to the proposal to change the publication of the list of approved services from semi-annually to annually. In addition to publishing, it on the website, DVHA should affirmatively share each updated list with the Office of the Health Care Advocate. The list should also be detailed enough to be meaningful to similarly situated Medicaid beneficiaries and should include enough details to clearly explain why a service was approved.

4. Section 4.105.5 Adverse Decisions

As these exception requests may pertain to services that are critical to meeting individual's needs, both this regulation and the notice of decision should explicitly state the individual's right to request an expedited appeal.

(A) "Vermont Medicaid will inform a beneficiary who receives an adverse decision of their right to appeal through the State fair hearing process. The notice will include an explanation of the beneficiary's right to request an expedited appeal."

We also object to the language in paragraph (B) restricting review.

(B) "A reviewing authority may not reverse the Commissioner's or their designee's decision unless it determines that the decision was an abuse of discretion."

This language is not appropriate in this regulation specifying the coverage criteria. Federal regulations governing Medicaid appeals, HCAR 8.100 governing appeals, as well as Vermont law providing for a right to an appeal before the Human Services Board fully set out the appeal process and the correct standard for review of an exception request.

We further object to the twelve- month ban on resubmitting requests.

(C) "A request for a service for which there has been an adverse decision may not be renewed by the same beneficiary until twelve months have elapsed since the previous final decision or until one of the following has been demonstrated"

Many of these exception requests will be submitted by the beneficiary directly without legal representation and may be denied for lack of adequate documentation. The one-year restriction on submitting a renewed request should not be a complete bar. We suggest adding "reasonably" to (1) and adding an exception for good cause in some circumstances:

(1) New documentation of the individual's condition that was not reasonably available at the time of the prior request

Exception: A request shall be considered notwithstanding the one-year bar if (1) the basis for denial was lack of adequate documentation and the individual had a barrier to submitting the necessary documentation in the initial request or (2) the individual has a disability, and the disability impacted the individual's ability to submit documentation with the initial request; or (3) for other good cause.

Thank you for considering our comments.

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